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PP v. ABUCHI BEN JAMES

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
B [CRIMINAL APPEAL NO: B-05-238-10-2013 (NGA)]
4 SEPTEMBER 2015

CRIMINAL PROCEDURE: *Appeal – Acquittal and discharge – Appeal against – Appeal by prosecution – Accused person charged for trafficking in dangerous drugs – Doubts on chemist report of drugs – Chemist not present when drugs were tested – Running of equipments in chemistry lab monitored by science officers – Whether tests carried out by chemist or science officers – Whether prosecution proved nature and weight of drugs – Whether ingredients of charge proved – Dangerous Drugs Act 1952, s. 39B(1)(a)*

C

D

The respondent was charged at the High Court for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. Powdery and crystallised substances were discovered from inside the respondent's bag which he had retrieved earlier from the baggage claim carousel at Kuala Lumpur International Airport. The substances were later
E confirmed by the chemist ('SP1') to be 1236.5g of methamphetamine. According to SP1, she was not present at the lab when vials containing the drugs were placed in the equipment. The running of the equipments of the chemistry lab came under the purview of designated science officers. SP1 obtained the GCMS and GCFID results in the form of computer printouts
F two and four days later, respectively. At the end of the prosecution's case, the trial judge was dissatisfied with the accuracy of the analysis done by SP1 and further held that the appellant ('the prosecution') failed to prove the nature and weight of the drugs. The respondent was acquitted and discharged without the defence being called. Dissatisfied, the prosecution filed the
G present appeal. The sole issue for the court's determination was whether the nature and weight of the drugs stated in the charge had been proved by the prosecution.

Held (dismissing appeal; affirming order of acquittal and discharge)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

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(1) Based on the evidence of SP1, it was clear that two science officers calibrated the machines used for the GCMS and GCFID tests. They were given the samples by SP1 for analysis and they operated the machines. Following that, they gave the printout from the machines to SP1. Hence, there remained a doubt as to whether the analysis was done
I by the science officers or by SP1. If the analysis was done by the science officers, the evidence of the chemist was vitiated and the ingredients of the charge had not been proved. (paras 20 & 23)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah dipertuduh di Mahkamah Tinggi kerana mengedar dadah berbahaya, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Bahan-bahan serbuk dan kristal dijumpai dari dalam beg responden yang diambil olehnya dari karusel di Lapangan Terbang Kuala Lumpur. Bahan-bahan tersebut disahkan oleh pakar kimia ('SP1') sebagai 1236.5g methamphetamine. Menurut SP1, dia tidak berada di makmal semasa bebuli dadah diletakkan dalam perkakasannya. Pengendalian perkakasan makmal kimia jatuh di bawah skop pegawai-pegawai sains yang ditetapkan. SP1 mendapat keputusan GCMS dan GCFID dalam bentuk cetakan computer, masing-masing dalam dua dan empat hari kemudian. Di penutup kes pendakwaan, hakim bicara tidak berpuas hati dengan ketepatan analisis yang dijalankan oleh SP1 dan seterusnya memutuskan bahawa perayu ('pihak pendakwaan') gagal membuktikan sifat dan berat dadah tersebut. Responden dilepaskan dan dibebaskan tanpa dipanggil untuk pembelaan. Tidak berpuas hati, pihak pendakwaan memfailkan rayuan ini. Isu tunggal untuk pertimbangan mahkamah adalah sama ada sifat dan berat dadah yang dinyatakan dalam pertuduhan telah dibuktikan oleh pihak pendakwaan.

Diputuskan (menolak rayuan; mengesahkan perintah pelepasan dan pembebasan)

Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan keterangan SP1, jelas bahawa dua orang pegawai sains telah menentukur mesin yang digunakan untuk menjalankan ujian GCMS dan GCFID. Mereka diberikan sampel oleh SP1 untuk dianalisis dan mereka mengendalikan mesin tersebut. Selepas itu, mereka memberikan cetakan daripada mesin tersebut kepada SP1. Oleh itu, kekal terdapat keraguan mengenai sama ada analisis dijalankan oleh pegawai-pegawai sains atau SP1. Sekiranya analisis dijalankan oleh pegawai-pegawai sains, keterangan pakar kimia berjaya dipatahkan dan intipati pertuduhan gagal dibuktikan.

Case(s) referred to:

PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Zulkifli Md Rodzi v. PP [2013] 4 CLJ 250 CA ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 180(1)

For the appellant - Mohd Mukhzany Fariz Mohd Mokhtar; DPP
For the respondent - Gurbachan Singh Bagawan Singh; M/s Bachan & Kartar

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-23-02-2013]

Reported by Najib Tamby

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] The respondent was charged in the High Court at Shah Alam for the offence of trafficking in dangerous drugs. The charge against the respondent reads:

> That you on the 4th of May 2012, at about 2.55 p.m. in front of Carousel G, Arrival Hall, Level 3, MTB KLIA, in the district of Sepang, in the state of Selangor, did traffic in dangerous drugs, *to wit* 1236.5 grammes of Methamphetamine; and thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under Section 39B(2) of the same Act.

The Prosecution's Case

[2] On 4 May 2012 while SI Ghazalli bin Mohd Din (SP2) was on routine surveillance duty with other police personnel, he spotted the respondent at baggage claim carousel G. The respondent was said to be walking with a black sling bag from carousel G to carousel H and retrieved a trolley bag from carousel H.

[3] After retrieving the bag, the respondent walked towards the exit where he was stopped by two police personnel under the command of SP2.

[4] SP2 directed the respondent to scan the bags he was carrying. No suspicious images were detected. Prompted by the fact that no bag tag was attached to the trolley bag (the bag tag was subsequently found in the pocket of the respondent), SP2 directed the respondent to go to the inspection room.

[5] In the inspection room, the trolley bag (exh. P30) was examined. A few clothing, a mobile charger and some vehicle accessories were found in exh. P30. On a closer look and on opening the zipped bottom of the bag, SP2 felt some hard object on the left and right side of the back packages strengthened by cellophane tape. Concealed therein SP2 found powdery and crystallised substance suspected to be dangerous drugs.

[6] Upon analysis by the chemist, Puan Suhana binti Ismail (SP1), the substance was found to be Methamphetamine in the net weight of 1236.5g.

Findings At The End Of The Prosecution's Case

[7] Having alluded to s. 180(1) of the Criminal Procedure Code and having applied the principles set out in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, the learned trial judge found that the respondent was in possession of the dangerous drugs.

[8] However, having evaluated the evidence of SP1, His Lordship found that the prosecution had failed to prove the nature and weight of the drugs. In particular, the learned trial judge was not satisfied with the accuracy of the analysis done by SP1 wherein His Lordship found (at p. 19: appeal record vol. 1):

The testimony of the chemist SP1 revealed that she had done 4 kind of test in line with international requirement. 2 of this test that is the GCMC and the GCFID required samples to be placed in equipments provided in the chemistry lab. It was clear that the running of the equipments came under the purview of designated science officers.

In this case SP1 identified the 2 science officers who assisted her by accepting samples from her and placing them in the equipments. For the 2 tests SP1 had taken 7 samples each from the homogeneous mix of the seized suspected drugs substance given by the police. These samples were put in 14 vials. According to SP1 although there were other samples in similar vials for other cases fitted into the equipment each vial was identifiable by the chemistry label containing the unique laboratory number for each case.

For the GCMS test SP1 got the results in the form of computer print out after 2 days and for the GCFID test she got the computer print out after 4 days. SP1 admitted during these durations she was not present throughout the period the vials were placed in the equipment. SP1 also testified normally it took only a few minutes for the samples in the vials to be processed in the equipment.

In this case there is no issue that SP1 was an expert and I was satisfied that her credentials were sufficiently established by her qualification as well as her work experience. It however could not be denied that her final findings as to the nature and weight of the drugs were dependant on the accuracy of the results produced by the equipment.

It was therefore pertinent for the prosecution to prove that the equipments were in proper working order and properly calibrated especially since the condition of the equipment had been challenged by the defence counsel. To me the only persons who were correctly poised to answer this issue were the 2 science officers who had full control of the equipments.

[9] The respondent was accordingly acquitted and discharged without defence being called.

[10] Dissatisfied with the decision of the High Court, the prosecution appealed to this court. We heard the appeal and had unanimously dismissed the same. Our reasons now follow.

The Appeal

[11] The sole issue for our determination was whether the nature of the drugs ie, Methamphetamine and the weight ie, 1236.5g as stated in the charge, had been proven by the prosecution.

[12] The learned DPP submitted that the learned trial judge had erred in finding that the non-calling of the two science officers was fatal to the prosecution's case. Essentially, the learned DPP argued that SP1 had given an explanation that the role of the two science officers was merely to assist her in the analysis.

[13] In the light of the position taken by the learned DPP that the analysis was done by the chemist herself and that the two science officers merely assisted SP1, it was crucial to have a closer look at the evidence of SP1.

[14] In the examination-in-chief, (p. 30: appeal record vol. 1), SP1 had testified on the steps taken to analyse the dangerous drugs. According to SP1, she had used the Marquis test and Simon test for the colour. If the substance is positive for methamphetamine, the Marquis test and Simon test will give the orange colour and blue colour respectively. To determine the type or nature of the dangerous drugs, SP1 used the Gas Chromatography-Mass Spectrometer (GCMS) and to determine the weight, SP1 used the Gas Chromatograpy-Flame Ionization Detector (GCFID) test.

[15] In cross-examination, the following evidence was revealed (pp. 37 to 38: appeal record vol. 1):

S: Bagi ujian GCMS, siapakah lab assistant yang mengendalikan GCMS?

J: Untuk kes ini dikendalikan oleh En. Jeremiah.

S: Untuk semua kes di makmal Petaling Jaya adakah ia dikendalikan oleh En. Jeremiah saja?

J: Tidak, ia akan bergantung mengikut giliran penolong pegawai sains yang menjaga peralatan tersebut pada tempoh masa-masa tertentu.

S: Adakah semua ahli kimia menggunakan mesin yang sama yang akan dikendalikan oleh Jeremiah, setuju?

J: Ya, setuju

...

S: Bila puan telah memberi sampel GCMS kepada Jeremiah?

J: Saya telah beri pada 9.7.2012.

...

S: Bila Jeremiah habiskan ujian GCMS?

J: Saya dapat result pada 10.7.2012

[16] Further, at pp. 40 to 42: appeal record vol. 1:

S: banyak vial untuk kes ahli kimia yang lain, kes yang lain pada masa yang sama dalam mesin GCMS yang sama?

J: Ya, banyak sample yang lain.

S: Oleh ahli kimia yang lain?

J: Ya

S: Adakah penolong pegawai sains kebiasaannya akan mengambil result dan rujuk kepada library dulu sebelum serah kepada ahli kimia?

J: Library memang telah ada dalam mesin tersebut.

S: So, yang merujuk kepada library adalah penolong pegawai sains

J: Ya

S: Apakah maksud library?

J: Library itu adalah contohnya Methamphetamine standardnya telah dijalankan pada mesin tersebut dan library ini telah ada pada alat tersebut.

S: So daripada result perlu rujuk kepada library?

J: Ya, perlu dibandingkan dengan library di dalam mesin.

S: So, dalam kes ini, tugas untuk rujuk kepada library adalah tugas penolong pegawai sains dan bukan tugas puan?

J: Ya

S: Dan ujian ini adalah untuk menentukan jenis dadah?

J: Ya

S: Setuju dengan saya, tugas-tugas seperti kalibrasi mesin juga dilakukan oleh penolong pegawai sains iaitu Jeremiah

J: Ya

S: Tugas untuk key in dalam system juga adalah tugas Jeremiah?

J: Ya

S: Oleh yang demikian, puan telah serahkan 2 sample kepada En. Jeremiah dan selepas itu akan dikendalikan oleh Jeremiah until result diserahkan kepada puan?

J: Ya.

[17] Insofar as the GCFID test was concerned, the evidence of SP1 disclosed the following (pp. 42: appeal record vol. 1):

S: Merujuk puan kepada GCFID. Ini adalah untuk menentukan berat kuantiti dadah?

J: Ya

S: Sama juga dengan ujian GCM. Ini juga dilakukan menggunakan mesin yang dikendalikan oleh penolong pegawai sains, setuju?

J: Ia dilakukan oleh penolong pegawai sains juga.

S: Siapakah Penolong Pegawai Sains yang kendalikan mesin ini?

J: Cik Nurul Dalilah.

S: Dalam keterangan puan dalam kes ini puan telah beri keterangan En. Jeremiah dan Puan Dalilah adalah pembantu makmal?

J: Bukan, penolong pegawai sains.

[18] More pertinent was the following admission of SP1 (p. 47: appeal record vol. 1):

> S: Menurut keterangan puan, kedua-dua GCMS dan GCFID dilakukan oleh penolong pegawai sains lah iaitu En. Jeremiah dan Puan Dalilah yang mengendalikan ujian ini?
>
> J: Ya.

[19] Having regard to the above evidence, we were of the view that the learned trial judge did not err in stating that (p. 21: appeal record vol. 1):

> The failure of the prosecution in this case in calling the 2 science officer left a doubt in my mind as to the accuracy of the finding of the chemist. I was not prepared to convict the accused if I called for the defence and he chose to remain silent due to this failure of the prosecution.

[20] We found that the finding of the learned trial judge was supported by evidence. It was not perverse. Looking at the evidence of SP1, it was clear that the two science officers calibrated the machines used for the GCMS and GCFID tests; that they were given the samples by SP1 for analysis and that they operated the machines. Thereafter, they will give the print out from the machines to SP1 (p. 51: appeal record vol. 1).

[21] SP1 described her role as follows in re-examination (p. 54: appeal record vol. 1):

> S: Puan dah menjelaskan tadi, dalam tugas-tugas puan dalam ahli kimia, akhirnya puan bergantung kepada En. Jeremiah dan Puan Dalila. Maksud saya print out dari mereka. Boleh puan jelaskan setakat mana keputusan print out ini dalam keputusan analisa yang puan jalankan?
>
> J: Peralatan tersebut akan mengeluarkan print-out dan kesemua print out akan diserahkan kepada saya dan saya akan menentukan bacaan pada print out tersebut dengan menggunakan kaedah statistic untuk mendapatkan berat sebenar Methamphetamine di dalam bahan yang saya terima.

[22] In fact the learned trial judge had posed the following question to SP1 (p. 55: appeal record vol. 1):

> Mkh: Tadi apa yang kamu jawab tadi, finding kamu adalah berdasarkan kepada print out yang diserahkan. Jika ada kesilapan pada print out, kamu juga akan tersilaplah dalam analisa?
>
> J: Ya.

[23] From the above evidence, what was certain was that only the print out was given to SP1. Hence, there remained a doubt whether the the analysis was done by the science officers or by SP1. If the analysis was done by the science officers, the evidence of the chemist was vitiated and the ingredients of the charge had not been proven (see *Zulkifli Md Rodzi v. PP* [2013] 4 CLJ 250; [2013] 3 MLJ 745).

[24] Based on all the above, we found no compelling reason to disturb the finding of the learned trial judge. We therefore unanimously dismissed the appeal by the prosecution. The order of acquittal and discharge of the respondent was affirmed.